



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS and APPEALS**



In the matter of:)
)
) ISCR Case No. 11-01495
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

03/05/2014

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. Applicant failed to file his 2005 through 2009 federal income tax returns in a timely manner. He has now filed all his delinquent returns. The financial considerations security concerns are mitigated. Clearance is granted.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on September 17, 2013, the DoD issued an SOR detailing security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On October 9, 2013, Applicant answered the SOR and requested a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

hearing. On December 6, 2013, I was assigned the case. On December 31, 2013, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing convened on January 15, 2014. I admitted Government's Exhibits (Ex) 1 through 4 and Applicant's Exhibits A through C, without objection. Applicant testified at the hearing. The record was held open to allow Applicant to submit additional information. Additional material (Ex. F through H) was submitted and admitted into the record without objection. On January 24, 2014, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted all of the factual allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 53-year-old field and service mechanic who has worked for a defense contractor since January 2009. He previously worked for the same employer from January 2004 to January 2005, before being laid off for four years. (Ex. 2, Tr. 24) He seeks to obtain a security clearance. (Tr. 46)

Applicant called no witnesses other than himself. He has received three spot awards of \$150 each for his outstanding performance. (Ex. A-3 to A-5) The Field Operations Manager, who has known Applicant for five years, states Applicant has an excellent work ethic, is very dependable, and is an excellent mechanic. (Ex. A-1) The completion supervisor, who has known Applicant for two years, has the utmost confidence in Applicant and fully supports a decision to grant him a clearance. (Ex. A-2)

In a May 2011 Personal Subject Interview (PSI), Applicant was asked about his delinquent accounts. (Ex. 2) In September 2011 and August 2012, he responded to written financial interrogatories asking about his tax filings and other delinquent accounts. (Ex. 2 and 3) In the May 2011 PSI, Applicant stated he had not filed his 2005 through 2010 federal income tax returns. He did not file in 2005 or 2006 because he did not have the money to pay the tax owed. (Ex. 2) He intended to file his 2009 federal return as required in 2010, but his wife got sick and he did not have sufficient funds to pay his federal taxes. (Ex. 2)

Until May 2010, Applicant's wife was an administrative assistant. (Tr. 26) Three years ago she suffered a traumatic brain injury and had psychological problems, which affect her memory. (Tr. 33, 34) She had been the manager of the household's finances. (Tr. 33) She is now receiving social security compensation of which \$162 (fifteen percent) is withheld to pay the federal income tax owed. (Tr. 26)

In March 2011, Applicant filed his 2007 through 2010 returns. (Ex. 2) At that time, he owed: \$540 (2007), \$2,075 (2008), \$3,512 (2009), and his tax year 2010 refund of \$134 was applied to his 2004 tax debt leaving a remaining balance owed of \$140. (Ex.

2) In July 2011, Applicant received letters from the IRS stating he had satisfied his tax obligations for tax year 2007 and 2008 and owed \$3,551 for tax year 2009. (Ex. 2)

Applicant's and his wife's joint income for 2007 was \$75,000 of which \$45,000 was taxable income. (Tr. 30) In 2008, their combined income was \$89,000 of which \$64,000 was taxable. (Tr. 30) In 2009, their combined income was \$108,000 with taxable income of \$81,000. He owed approximately \$11,000 in federal tax for 2009, of which \$6,800 had been withheld from his salary. (Tr. 30) For tax year 2010, his joint income was \$81,000 of which \$58,000 was taxable. (Tr. 30) For 2013, his income was \$74,000 and his wife's social security income was \$13,000.

As of the May 2011 PSI, Applicant did not know how much he owed for tax years 2005 and 2006 because he had yet to file returns for those years. In September 2011, when he answered written financial interrogatories, Applicant had yet to file his 2005 and 2006 federal income tax returns. As of January 2014, he stated he had not filed his returns for 2005 and 2006. (Tr. 29) In 2005, he was unemployed for two to three months. (Tr. 36, 48) He lives in a state that does not have state income tax. As of the date of the hearing, it was his plan to complete his 2012 and 2013 tax returns before starting to work on his 2005 and 2006 tax returns. (Tr. 37)

Although repeatedly asked about the filing of Applicant's 2006 federal income tax return, it was not until after his hearing that he provided a copy of his 2006 return that had been filed in April 2007. (Ex. E) In April 2013, he filed his 2012 federal return, which indicated he had overpaid his taxes by \$520. (Ex. F) In February 2014, he filed his 2005 federal return in which he had overpaid his tax obligation by \$51. (Ex. D)

Applicant divorced in 1988 and was required to make \$250 monthly child support payments. (Ex. 2) Between 1997 and 2004, he failed to make the required monthly child support payments. (Ex. 2) When he obtained his current job, his ex-wife obtained a garnishment of \$660 weekly for the delinquent support. As of 2007, he owed \$27,000 in support. (Ex. 2, Ex. 3) His daughter is now age 29. (Tr. 27) Having paid \$52,000 in child support, Applicant asserted, but provided limited and very cryptic supporting documentation, that his ex-wife waived or forgave the \$50,000 child support still owed. (Ex. 3, Tr. 28) He provided an August 2011 state attorney general accounting showing a zero amount owed for child support. (Ex. 3)

As of August 2012, Applicant owed approximately \$32,000² in student loans obtained starting in 1987 when studying to obtain his airframe and power plant certificates. (Ex. 2, Ex. 3, Ex. B, Tr. 25) For twenty years, until 2007, he made no payments on his student loans. (Ex. 2) In his May 2011 PSI, he stated fifteen percent of his weekly pay (\$125 to \$150) was being garnished to address the student loan debt. (Ex. 2) Between June 2013 and December 2013, he made four months of payments of

² As of August 2012, Applicant had made \$16,369 in student loan repayments. (Ex. 3) His February 2014 PFS indicates the balance on his student loans is \$17,839. (Ex. G)

\$238.69 and two monthly payments of \$226.70. (Ex. B) As of January 2014, he had reduced the amount owed to \$18,000 by making \$238 monthly payments. (Tr. 23)

In 2010, Applicant's wife had a traumatic brain injury that caused cognitive decline which affected her speech and caused her to require the use of a walker or wheel chair. She now receives \$1,086 in monthly social security income. Before her illness she was making \$35,000 annually. (Ex. 2) Fifteen percent of her monthly social security payment (\$162.90) is withheld and forwarded to the IRS to address their tax obligation. Applicant has altered his tax withholding amount to allow more tax to be withheld from his pay. This will result in a larger amount of tax that will be intercepted when his tax returns are filed. (Tr. 57)

Applicant drives a 2000 Nissan and his wife drives a 1999 Nissan. (Tr. 42) He is current on his rent and utility bills. (Tr. 43) As of the May 2011 PSI, Applicant owed no home payments, had no car payment, and no major credit card debt. (Ex. 2) At the time of the hearing, he owed \$17,300 on credit card and other credit accounts. (Ex. G, Tr. 43) He has \$13,000 in his 401(k) retirement plan. (Ex. H, Tr. 53)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the interests of security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has a history of financial problems. Applicant failed to fulfill a basic obligation to the Government, the timely filing of his federal income tax returns. Applicant's 2007, 2008, and 2009 federal returns were not filed until 2011. His 2005 return was not filed until February 2014, eight years after it was due. He owes \$3,550 in

federal tax for tax year 2009. Disqualifying Conditions AG ¶ 19(a), “inability or unwillingness to satisfy debts,” AG ¶ 19(c), “a history of not meeting financial obligations,” and AG ¶ 19(g), “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same,” apply.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant failed to file his federal income tax returns in a timely manner. He did so for numerous tax years. His 2005 return was filed after his hearing. Because he had multiple delinquent tax filings and was eight years late on his 2005 return, the handling of his finances, under the circumstances, casts doubt on his current reliability, trustworthiness, or good judgment. He receives minimal application of the mitigating conditions listed in AG ¶ 20(a).

Likewise, he receives partial application of the mitigating conditions listed in AG ¶ 20(b). His wife experienced a traumatic brain injury and cognitive decline causing her to obtain social security benefits. Her income was reduced from \$35,000 to \$13,000 annually. His returns were not filed timely. As such, he has failed to act responsibly under the circumstances.

Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his or her control, I must still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR

Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999).

The mitigating condition listed in AG ¶ 20(c) does apply Applicant has be latently filed all of his federal returns and his delinquent tax is being paid by garnishment. The mitigating condition listed in AG ¶ 20(d) applies to those returns, which have been filed and paid. It also applies to 2009 tax year that is being paid by garnishment.

Applicant had known of the Government's concern about his unfiled tax returns and unpaid taxes since May 2011, when he was questioned about his finances. In September 2011 and again in August 2012, he was asked about his delinquent taxes in written financial interrogatories. In September 2013, he received the SOR stating the Government's concerns about his delinquent taxes. Even with this questioning, he did not file his 2005 returns until after the hearing. He did not act aggressively, timely, or responsibly in the resolution of his taxes.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. There is some evidence in favor of mitigating Applicant's conduct. He is an excellent mechanic and his work performance is outstanding. He and his wife are not living beyond their means. His wife drives a 1999 car and he drives 2000 car. His wife's traumatic brain injury and cognitive decline greatly reduced the household's income. All of his federal returns have now been filed and his last delinquent taxes are being paid by garnishment.

The issue is not simply whether all Applicant's tax returns have been filed and taxes paid; it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1).) Applicant was extremely late in filing his federal tax returns. However, they are now filed. Applicant has mitigated the security concerns arising from his financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Financial Considerations: FOR APPLICANT

Subparagraphs 1.a -1.e: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge